86-650

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JO EVELYN ROBINSON,
Petitioner

vs.

COMMONWEALTH OF KENTUCKY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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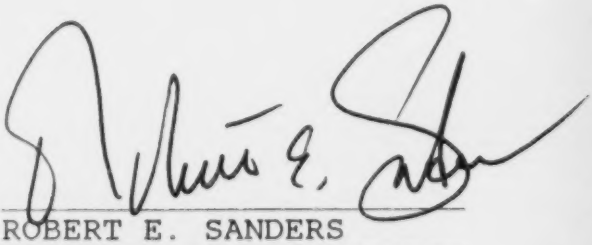
CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 1986, I served by United States Mail, three true and correct copies of this Petition for Writ of Certiorari upon all parties required to be served: Hon. David L. Armstrong, Attorney General of the Commonwealth of Kentucky, Office of the Attorney General, Capitol Building, Frankfort, Kentucky 40601; Hon. Paul Twehues, Campbell County Attorney, 331 York Street, Newport, Kentucky 41071; and upon Hon. Justin Verst, Assistant Campbell County Attorney, 331 York Street, Newport, Kentucky 41071.



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QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS DENIED HER SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HER WHEN THE COMMONWEALTH OF KENTUCKY FAILED TO DISCLOSE ITS INTENT TO CALL A WITNESS AS REQUESTED IN A BILL OF PARTICULARS, AND WHEN THE TRIAL COURT OVERRULED A DEFENSE MOTION FOR A CONTINUANCE, DENYING THE DEFENSE AN OPPORTUNITY TO PREPARE EFFECTIVE CROSS-EXAMINATION OF THE WITNESS.

II. WHETHER PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT, BY THE PROSECUTOR'S CONDUCT DURING CROSS-EXAMINATION OF DEFENSE WITNESSES AND DURING CLOSING ARGUMENTS WHEN, OVER OBJECTIONS, HE WAS ALLOWED TO MAKE REPEATED REFERENCES TO UNRELATED CONVICTIONS, AND UNRELATED ARRESTS IN WHICH NO CONVICTIONS WERE EVER OBTAINED.

III. WHETHER PETITIONER WAS DEPRIVED OF HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW, WHEN THE TRIAL COURT REFUSED, AS A MATTER OF POLICY, TO CONSIDER PROBATION AND CONDITIONAL DISCHARGE, DISREGARDING KENTUCKY CASE LAW AND KENTUCKY STATUTES REQUIRING SUCH CONSIDERATION, AFTER A JURY VERDICT SET A SENTENCE AND PENALTY.

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vs.

COMMONWEALTH OF KENTUCKY

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE KENTUCKY COURT OF APPEALS

Petitioner, Jo Evelyn Robinson, respectfully prays that a Writ of Certiorari be issued to review the Judgment of the Kentucky Court of Appeals in this case.

OPINION BELOW

The Order of the Kentucky Court of Appeals denying discretionary review in this case is attached hereto as Appendix "A".

The Judgment of the Campbell Circuit Court, adopting and reaffirming a previously vacated Order and Judgment, is attached hereto as Appendix "B".

The verdict of the Campbell County Kentucky District Court is attached hereto as Appendix "C".

JURISDICTIONAL STATEMENT

The Order of the Kentucky Court of Appeals denying discretionary review of this case was entered July 23, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3), Petitioner having asserted below, and asserting herein, deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution which are relevant to the determination of the present case are the following: U.S. Const. Amendments VI and XIV. See appendix "D" for the text of these Amendments.

The Kentucky statutes and criminal rules which are relevant to the determination of the present case, are the following: Ky. Rev. Stat. Ann. Sections 529.060, and 533.010 (Baldwin 1984), and Ky.R.Crim.P. 6.22, which are set out verbatim herein.

STATEMENT OF THE CASE

On May 14, 1985, Petitioner, Jo Evelyn Robinson, an exotic dancer, was employed as the feature act at The Brass. The Brass is a nightclub located in Newport, Kentucky. While working, Petitioner noticed Newport Police

Officer Coy Cox as he sat at a table posing as a customer of the establishment, and asked him if he would like to buy her a drink. The drink price is eight dollars. By purchasing a drink for a dancer, the customer is then permitted ten minutes of conversation with a dancer with whom a customer would normally not be permitted to speak. This practice is known as "mixing" and is a means by which dancers at The Brass earn additional money based on a percentage of the total amount of money spent on drinks purchased for them.

Having agreed to purchase a drink for her, Officer Cox falsely identified himself as "Doug" and told Jo Evelyn he was employed at Proctor and Gamble in Cincinnati, Ohio.

Later in the evening, Officer Cox, (known to Petitioner as "Doug") agreed to buy Jo Evelyn a "fish bowl". This is a more expensive drink ranging in price from thirty-five dollars to fifty-five dollars, depending on how much the customer wishes to spend. The dancer also receives a percentage of a "fish

bowl", and the customer is permitted to converse with the dancer, usually a feature act, for an additional thirty minutes.

Petitioner and Officer Cox moved to a booth and conversed. At the close of their conversation, Petitioner asked "Doug" to stop in again. Her intention was to encourage "Doug" to return and thereby possibly earn additional drink sale commissions, which was common practice in such establishments. There was never any allegation that any improper or illegal conversation occurred during this meeting.

Two days later, on May 16, 1985, Officer Cox returned to The Brass, once again posing as a customer. This time he was approached by another dancer known as "Serena Storm". He told Serena that he was there to see "Angel" (Petitioner's stage name is "Angel Delight"), who was dancing at the time. Later, Petitioner joined "Serena" and "Doug" at a table and the three of them conversed.

From this point forward, the testimony of Petitioner, Serena and Officer Cox conflicts.

Officer Cox testified that when Petitioner joined he and Serena at the table, Serena mentioned a "menage a trois", then left to sit with another customer. Officer Cox testified that Petitioner then suggested that only the two of them get together, and asked him what time he finished work the next day (Friday, May 17, 1985). (Trial Tape 7236, side 2).

Officer Cox testified that they arranged to meet at the River City Landing, a local restaurant, at 5:00 p.m. the next day and that Petitioner would "fuck and suck" him. This activity was supposedly to occur at the Travel Lodge, a nearby motel. It was further alleged that Petitioner instructed him to bring around one hundred and fifty dollars: thirty for the room, one hundred for her, and the rest for drinks. (Trial Tape 7236, side 2).

Petitioner, Jo Evelyn Robinson, testified that "Doug" seemed different from the routine customer who frequented The Brass; he was

sophisticated and treated her with kindness. She further testified that she had been impressed with "Doug" and was interested in seeing him socially, and that he had seemed, by his conduct, to be equally interested. (Trial Tape 7238, side 2). Although Jo Evelyn does not normally date customers, she liked "Doug" and saw him as "different" from the ordinary patrons. (Trial Tape 7239, side 1).

Petitioner and "Doug" arranged to meet at the River City Landing at 5:00 p.m. the following day for drinks and dinner before she was scheduled to work at The Brass at 7:30 p.m. Petitioner further testified that there was never any mention of "fucking and sucking", the Travel Lodge, or of any money. (Trial Tape 7238, side 2).

The only other witness testifying for the Commonwealth at trial was Police Lt. Kenneth Page, who was not present during any of the conversations or meetings between Officer Cox and Jo Evelyn. Nevertheless, Lt. Page was permitted, over repeated objections by defense

counsel, to describe to the jury in particularity, the history of prostitution and vice in the City of Newport, and to give a detailed account of the efforts made by the Newport Police Department to clean up the City. (Trial Tape 7235, sides 1 & 2). None of the information elicited during Lt. Page's testimony was relevant or material to the charges against Petitioner.

Likewise, during the testimony of defense witnesses, and over repeated objections, the prosecutor, was allowed by the Trial Court to cross-examine regarding prostitution within the City of Newport, in which convictions were obtained against other women employed at various nightclubs. The prosecutor further questioned defense witnesses, concerning other prostitution arrests, in which no convictions or adjudications of guilt were secured. None of these cases had anything whatsoever to do with Petitioner, or the events which led to the charges against her. (Trial Tape 7236, side 1).

Although the trial court sustained defense objections to references regarding undisposed of, or open prostitution charges, and finally admonished the prosecutor against the use of such information,(Trial Tape 7235, side 2), the prosecutor nevertheless persisted and continued to read open charges from a stack of his records, within the guise of questions. (Trial Tape 7236, side 1). The implication to the jury was that Petitioner, a woman with no prior criminal record of any kind, was responsible for the evils, whether real or imaginary, in Newport, Kentucky.

The jury found Petitioner guilty of prostitution and fixed her punishment at thirty days confinement in the county jail and a fine of two hundred fifty dollars. Immediately thereafter, the trial judge entered judgment on the jury's verdict, overruled Defendant's request for a pre-sentence investigation, and gave no consideration to probation or conditional discharge. (Trial Tape 7240, side 1). The execution of the sentence

was postponed until August 12, 1985, in order for defense counsel to begin the appellate process. At that time, defense counsel again moved for probation or conditional discharge. The court, reiterating its position taken earlier at trial, stated that its policy was never to probate or conditionally discharge a sentence returned by a jury verdict. (Trial Tape 7233, side 1).

Defense counsel filed a Statement of Appeal on October 9, 1985, to which the Commonwealth filed a Counterstatement of Appeal on October 25, 1985. A Reply Memorandum in response to the Counterstatement of Appeal was filed by defense counsel on November 13, 1985. Although the defense had, by right, until November 14, 1985, to file the reply brief, Judge Leonard Kopowski, the judge designated on appeal, entered his judgment affirming the verdict on November, 4, 1985. This was ten days before the deadline for Defendant's reply brief.

As a result, Judge Kopowski, upon motion of defense counsel, recused himself and set aside the judgment of November 4, 1985, on November 21, 1985. The case at bar was subsequently assigned to Judge George Muehlenkamp of the Campbell County Kentucky Circuit Court for adjudication upon appeal. On April 22, 1986, Judge Muehlenkamp entered a judgment adopting and reaffirming the vacated Judgment of November 4, 1985. The Defendant filed a timely Motion for Discretionary Review with the Kentucky Court of Appeals which was denied July 23, 1986. This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I.

THE COMMONWEALTH OF KENTUCKY, BY FAILING TO DISCLOSE ITS INTENT TO CALL LT. PAGE AS A WITNESS, AND THE TRIAL COURT, IN OVERRULING THE DEFENSE MOTIONS IN LIMINE OR FOR A CONTINUANCE, VIOLATED PETITIONER'S RIGHT TO MEANINGFULLY CONFRONT WITNESSES AGAINST HER, AS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Kentucky Rule of Criminal Procedure 6.22 reads as follows:

> The Court for cause shall direct the filing of a bill of particulars. A motion for such bill may be made at any time prior to arraignment, or thereafter in the discretion of the Court. A bill of particulars may be amended at any time subject to such conditions as justice requires. (Ky.R.Crim.P. 6.22)

In the case at bar, counsel for the defense filed a Motion for a Bill of Particulars, pursuant to Kentucky Rule of Criminal Procedure 6.22, which was sustained by the Campbell County District Court, requesting in part that the Commonwealth:

6. Provide the Defendant with the names and addresses of any witnesses to the alleged violation and/or of any persons who could provide corroboration thereof.

In response to this motion, the Commonwealth represented to the defense that the only witness to be called was Officer Cox, the arresting officer. At trial, the Commonwealth, contrary to this representation, called Lt. Page of the Newport Police Department as a witness. Over repeated objection by defense counsel, Lt. Page was permitted to testify concerning the manner in which police investigations were conducted in numerous clubs throughout Newport -- testimony which was totally unrelated either to Petitioner, the events which transpired between Petitioner and the police officer, or to the specific club in which Petitioner was working at the time. (Trial Tape 7235, sides 1 & 2).

The Commonwealth contends that the Kentucky Rules of Criminal Procedure do not contain a requirement that the prosecution

furnish a list of material witnesses to the defense upon request. Although there is no particular rule specifically addressing this point, the purpose of a Bill of Particulars is to furnish information necessary to enable an accused to understand and prepare his defense against the charges without prejudicial surprise upon trial.

As recognized by William Haynes in his treatise (Haynes, Kentucky Jurisprudence [Criminal Procedure] (1985)), Criminal Rule 6.22 is complimentary to the shorter form of indictment permitted under Criminal Rule 6.10, and, therefore, its function is to supplement and provide any additional information that a defendant needs to prepare his defense against the charges without prejudicial surprise upon trial. (Haynes, supra, at 173). See, Brown v. Commonwealth, 378 S.W.2d 608 (Ky. 1964) (overruled on other grounds), Payne v.Commonwealth, 656 S.W.2d 719 (Ky. 1983).

This position is further buttressed by the fact that a motion made pursuant to

Criminal Rule 6.22 can be amended at any time when justice requires according to the rule. It is therefore evident that the policy in Kentucky favors discovery and inspection in criminal proceedings.

Contrary Kentucky case law such as Commonwealth v. Barber, 643 S.W.2d 592 (Ky. Ct.App. 1982), is distinguishable from the facts at bar. Barber dealt with a perjury prosecution in which a handwriting expert was called to testify that the signature on the sworn statement in controversy was in fact that of the defendant, and the prosecution's failure to disclose the name of that witness. The decision in Barber, was based on an in-depth analysis of both King v. Venters, 596 S.W.2d 721 (Ky. 1980), and Donovan v. Commonwealth, 610 S.W.2d 601 (Ky. 1980). Neither of these cited cases is any more on point factually with the case at bar, than is the citing case.

King dealt with an appeal from an order of the Court of Appeals denying prohibition

against an order of the trial court requiring the defendants to submit a witness list to the Commonwealth. The case narrowly held that there is no authority requiring a defendant to furnish a witness list to the Commonwealth. Id.at 721. Likewise, Donovan, the case most heavily relied on in the Barber opinion, dealt specifically with the defendant's being required to furnish the prosecution with a list of witnesses in a Fifth Amendment context.

The facts of Barber and its supporting line of cases are totally inapplicable to the situation before this Court. Here, Lt. Page did not testify as an expert witness, but rather gave irrelevant and inflammatory testimony explaining the procedures of the Newport Police Department concerning various other unrelated investigations into Newport night life.

Likewise, the analysis in Barber related only to the defendant's rights and duties in supplying discovery information to the

Commonwealth and with Fifth Amendment ramifications. Had the case at bar dealt with Jo Evelyn's failure to provide the Commonwealth with the name of a witness and/or a Fifth Amendment issue, Barber could be said to weaken the Petitioner's position. The case at bar, however, deals with the **Commonwealth's** intentional withholding of information specifically requested in the defense's Motion for a Bill of Particulars. As such, Barber cannot possibly be relevant to an analysis of the issues at bar, nor does it weaken the arguments presented.

The failure of the Commonwealth to disclose that Lt. Page would testify, thereby misrepresenting discovery information to the defense, constitutes reversible error pursuant to Davis v. Commonwealth, 464 S.W.2d 250 (Ky. 1970), in which the Kentucky Supreme Court held:

> When it is recalled that the appellant was forced to trial over the proclaimed unpreparedness of his counsel, completely frustrated in his effort to obtain a

> meaningful bill of particulars . . . it appears obvious that his rights were substantially prejudiced. Id. at 252.

Item 6 of Defendant's Bill of Particulars not only requested "eye-witnesses," but also that the defense be apprised of any "corroborating witnesses". Unless Lt. Page was a witness to the event, or a witness providing corroboration of the event in some way, his testimony was irrelevant and immaterial to the case at bar.

If Respondent argues that Lt. Page was neither a witness to the event nor a witness providing corroboration of the event in some way, and hence his testimony was not subject to discovery under the Bill of Particulars, then his testimony was irrelevant and inadmissible at trial.

Since Lt. Page testified, he must have been deemed either a witness to the event or a corroborating witness in order for his testimony to have been adjudicated sufficiently relevant to have been presented before the jury. Therefore, because his expected

testimony was not disclosed in the Bill of Particulars, his actual testimony at trial was error. In James v. Commonwealth, 482 S.W.2d 92 (Ky. 1972), the Kentucky Court of Appeals stated that [the Defendant] should not have "to guess whom the Commonwealth might use as corroborating witnesses . . ." Id. at 93.

The Commonwealth's failure to disclose Lt. Page as a witness, and the trial court's allowing him to testify over repeated objections of defense counsel, (Trial Tapes 7234 side 2, 7235 sides 1 & 2), unquestionably deprived Petitioner of her right to confront the witnesses offered against her, as mandated by the Sixth Amendment to the Constitution of the United States. As stated by this Court, the right to confront forms the core of the values furthered by the Sixth Amendment, and "the right of cross-examination is an essential and fundamental requirement of the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400 (1965). Likewise, in Stevens v. Borden-

kircher, 746 F.2d 342, 346 (6th Cir. 1984), the United States District Court for the Eastern District of Kentucky recognized effective cross-examination as a fundamental right.

In keeping with this premise, courts and proceedings which prevent the criminal defendant from attempting to show bias, prejudice or lack of credibility on the part of a prosecution witness have consistently been held to violate the Confrontation Clause. Davis v. Alaska, 415 U.S. 308 (1974); Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S. 687 (1931).

Such was the situation at bar. Although Defendant had the opportunity to question Lt. Page, in that he was present in the courtroom, Defendant was denied even the opportunity to formulate an effective cross-examination, as interpreted by this Court.

A trial is an adversarial proceeding, and the purpose of cross-examination is to

question the credibility of the witness and test his recollection. Ideally, this process will reveal the truth. Effective Cross-Examination cannot be accomplished without careful pre-trial preparation, aimed at presenting the jury with the widest possible panorama. Petitioner was not afforded this opportunity, and therefore the jury hearing her case was not presented with all the facts necessary to reach a carefully-rendered verdict. As this Court has stated:

> The primary object of the constitutional provision in question was to prevent depositions or ex-parte affidavits being used in lieu of a cross-examination of the witness in which the accused has an opportunity of . . . sifting the conscience of the witness.
>
> Mattox v. United States, 156 U.S. 237, 242-243 (1895).

Defense counsel's inability to vigorously cross-examine Lt. Page rendered his testimony little more than an ex-parte soliloquy, thereby defeating the doctrinal basis for the Confrontation Clause. Unable to interview or in any way discover a witness he knew nothing

about, there was no possible way that counsel for the defense could attempt to dispute the irrelevant testimony of Lt. Page. Lt. Page's testimony was undoubtedly made more credible and convincing to the jury due to his cloak of authority as a police officer and by the details of his years of experience in previous irrelevant vice investigations, which were drawn out in extensive detail by the prosecutor. The jury was therefore fed only the dish served to them by the Commonwealth -- a dish of little substance, but upon which they feasted heartily.

There can be little doubt that Lt. Page's irrelevant testimony was planned, and intentionally withheld by the Commonwealth. This resulted not only in reversible error on the part of the trial court, but also in a total violation of Petitioner's rights under the Sixth Amendment to the Constitution of the United States.

II.

IMPROPER CONDUCT BY THE PROSECUTOR DURING CROSS-EXAMINATION OF DEFENSE WITNESSES AND DURING CLOSING ARGUMENTS DEPRIVED PETITIONER OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the case at bar, the prosecutor's blatant and repeated attempts to get clearly inadmissible evidence to the jury constituted reversible error. During the trial, Mr. Roger Peterson, manager of The Brass nightclub, was called to testify for the defense. On cross-examination, the prosecutor asked whether the management of The Brass had "managed to be successful at stopping prostitution at The Brass." (Trial Tape #7238, side 1) Although Mr. Peterson replied affirmatively, stating, "[I] can't say it never's (sic) gone on there" the prosecutor, in the guise of impeachment, proceeded to present the jury with unadjudicated charges against alleged perpetrators in totally unrelated cases:

> Mr. Verst: Do you know a Margaret Ann Cope? Are you aware of a charge of prostitution against her back in 1978 out of the Brass Mule?

Mr. Peterson: No I'm not - she was never arrested on the premises . . . if there was a charge against her later on, I have no idea.

Mr. Verst: Are you aware of a Roberta Patton?

Mr. Peterson: Correct.

Mr. Verst: . . . two counts of prostitution out of the Brass Mule, also of December of 1984. Do you know where she is now? She failed to appear for trial and a Bench Warrant was issued for her . . . she's never been located . . . Do you know a girl named Bambi? Where's Bambi?

Over repeated objections by defense counsel and admonition by the trial court, the prosecutor nonetheless pursued a line of questioning concerning unadjudicated accusations of wrongdoing dealing with other individuals. Clearly, the prosecutor, a well-educated and seasoned advocate, knew the impropriety of such action, especially after having been informed of such by the bench. Equally as clear is the fact that the prosecutor presented these unrelated facts in the guise of substantive evidence, when in fact the prosecutor had no substantive evidence to present. A prosecutor's use of incidents

involving another person at a time and place remote from the matter on trial in cross-examination was specifically condemned by the Kentucky Supreme Court in Woodford v. Commonwealth, 376 S.W.2d 526 (Ky. 1964).

As early as 1909, in the often-cited decision of Louisville & N. R. Co. v. Payne, 118 S.W. 352 (Ky. 1909), the Kentucky Supreme Court espoused the following presumption in order that courts throughout the Commonwealth might retain their credibility as fair but adversarial forums:

> where counsel persistently pursues a line of interrogation which the Court rules to be wrong and which one reasonably well acquainted with the rules governing the admission of evidence must be known to be improper, the conclusion is that it is done for the purpose of influencing and prejudicing the minds of the jury. Id. at 354.

As articulated by Justice Lukowski for the Kentucky Supreme Court in Bowler v Commonwealth, 558 S.W.2d 169 (Ky. 1977), the highest court of Kentucky

> has repeatedly held that where the Commonwealth Attorney persists in asking improper and prejudicial questions for the purpose of getting before the jury evidence which the law does not permit them to hear, a judgment of conviction will be reversed. Id. at 171.

Although the Commonwealth's Attorney might attempt to justify his conduct during cross-examination as an attempted showing of intent or lack of mistake under Edwards v. Commonwealth, 489 S.W.2d 23 (Ky. 1973), such an attempt is unfounded. Edwards and its progeny deal with witnesses who testify at trial to show intent or lack of mistake or innocent purpose of a defendant by utilizing materials connected with the defendant. None of the Clerk's packets containing the unadjudicated charges which the prosecutor used in the alleged "impeachment" of Mr. Peterson contained any information concerning Petitioner.

Under these circumstances, it is ludicrous at best to suggest that such "evidence" was introduced to show any common scheme, intent, lack of mistake, etc., on the part of

the Petitioner. Petitioner had no prior criminal record of any kind, and the prosecutor either knew or should have known this fact.

Presenting such prejudicial allegations before a jury by means of cross-examination, without being prepared to prove them, is generally regarded as reversible error. United States v. Bohle, 445 F.2d 54, 73 (7th Cir. 1971), St. Clair v. Eastern Air Lines, Inc., 279 F.2d 119, 122 (2d Cir. 1960), cert. denied, 364 U.S. 882 (1960).

Likewise, in his closing argument, the prosecutor again went outside the evidence when he told the jury:

> All these people are so concerned and so careful, but vice is still going on. Why do we have to fight it day in, and day out? Because they are not that concerned and not that careful.
>
> These girls go from one place to another. How many of these girls would you think, when they "fell" would report that? When asked, would report they had been convicted of prostitution? How many of you think they'd write "yes" to

> that? It's ridiculous to think they would answer that question truthfully when they go from this state to that state, and that state. Do you think she will go to Nevada next week if she is convicted today and say, fill out an employment application, and say 'Yes, I was convicted of prostitution in Kentucky'? And they won't hire me out there and, therefore, my livelihood is down the tubes. Let's be practical. Let's be reasonable.
>
> This is a way of life for these people. They are not going to put that down - that they have been convicted of prostitution in Newport or 'Vegas or anywhere else. And we don't know that she wasn't! (Trial Tape 7239, side 2).

There was, of course, no evidence to support such an outrageous argument because, in fact, the Defendant had never, before the instant case, been accused of prostitution in any State. Surely, the Commonwealth's Attorney, a vigorous advocate, came to this realization during his trial preparation. Furthermore, an experienced prosecutor also should have known that reference to facts and conclusions, which are outside the evidence, are strictly forbidden in Kentucky, pursuant to Barnett v. Commonwealth, 403 S.W.2d 40 (Ky. 1966).

It is clear that the prosecutor, by injecting irrelevant and inadmissible matters into the trial, attempted to picture for the jury imaginary situations which had no foundation in the record. The very same grounds constituted reversible error in Parsley v. Commonwealth, 306 S.W.2d 284, 286 (Ky. 1957).

The prosecutor's conduct did **not** result in Jo Evelyn being tried for the charges against her, but rather, for all the past and present problems associated with Newport night life. As such, the conduct of the prosecutor invaded the province of the jury and constituted a violation of Petitioner's right to due process under the Fourteenth Amendment to the Constitution of the United States.

The due process boundaries of prosecutorial argument in Kentucky were clearly delineated in Cook v. Bordenkircher, 602 F.2d 117 (6th Cir. 1979). In Cook, the Sixth Circuit adhered to the test articulated by this Court in Donnelly v. DeChristoforo,

416 U.S. 637 (1974), that prosecutorial argument, to violate the Constitution, must be so egregious as to render the entire trial fundamentally unfair. The Cook court further defined the Donnelly "egregious conduct" test by reference to the framework provided in United States v. Leon, 534 F.2d 667 (6th Cir. 1976):

> In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they were isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proofs introduced to establish the guilt of the accused. Id. at 679.

In the case at bar, such analysis flows towards a conclusion that the "egregious conduct" test was met, and that the Commonwealth's prosecutorial argument constituted a violation of due process of law. As review of the Record will show, the prosecutor continually and successfully sought to introduce evidence which was both inadmissible and highly inflammatory. He purposefully failed to disclose a witness, who then was permitted

to relate irrelevant testimony concerning the investigative procedures of the Newport vice squad. This testimony was entirely unrelated to either the Defendant or the charges against her. Throughout cross-examination of defense witnesses, the prosecutor utilized unadjudicated prostitution charges against other individuals in Newport, to cast a cloud of guilt and doubt over the Petitioner and to arouse within the jury an "us against them" sentiment of civic morality.

As for the strength of the competent proofs introduced to establish the guilt of the accused, the amount of objective proof required by statute in Kentucky, only serves to augment the contemptuous conduct of the prosecution. Pursuant to Kentucky Revised Statute 529.060 (1):

> No person shall be convicted of prostitution solely on the uncorroborated testimony of a patron.
> Ky.Rev.Stat.Ann. section 529.060 (1) (Baldwin 1984).

Furthermore, the official commentary to the statute reads in pertinent part:

> The corrobative evidence must tend to connect the accused with the commission of the offense charged. The corrobative evidence must be of such nature, character and quality that a reasonable and unprejudiced mind could conclude that it tends to establish some fact that links the accused with the principal fact of the commission of the offense charged. Ky.Rev.Stat.Ann. section 529.060, 1974 commentary (Baldwin 1984).

In Thompson v. Commonwealth, 621 S.W. 2d 36 (Ky.Ct.App. 1981), a police officer was determined not to be a patron within the meaning of K.R.S. 529.060 (1). Therefore, the only evidence presented at trial was the word of a police officer, clad in the authority and credibility of his official position, against the word of Jo Evelyn, a professional dancer, who by the reputation of her profession alone, was prejudiced in the eyes of the jurors before her case in chief had even begun.

In light of these facts, the egregious conduct of the prosecutor constituted a violation of Petitioner's due process rights.

III.

PETITIONER WAS DEPRIVED OF HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW, WHEN THE TRIAL COURT REFUSED, AS A MATTER OF POLICY, TO CONSIDER PROBATION OR CONDITIONAL DISCHARGE, IN APPARENT DISREGARD OF KENTUCKY CASE LAW AND KENTUCKY STATUTES REQUIRING SUCH A CONSIDERATION, AFTER A JURY VERDICT SET A SENTENCE AND PENALTY.

The Kentucky Statute in effect during this trial provided:

> (1) Any person who has been convicted of a crime and who is not been sentenced to death may be sentenced to probation or conditional discharge as provided in this chapter.
>
> (2) Before imposition of a sentence of imprisonment the court shall consider the possibility of probation or conditional discharge. After due consideration of the nature and circumstances of the crime and the history, character and condition of the defendant, probation or conditional discharge should be granted unless the court is of the opinion that imprisonment is necessary for protection of the public because:
>
> > (a) There is substantial risk that during a period of probation of conditional discharge the defendant will commit another crime; or
> >
> > (b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or

> (c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.
> Ky. Rev.Stat.Ann. section 533.010 (Baldwin 1984).

Although the statute leaves the granting of probation to the discretion of the trial court, subsections (2)(a) - (c) set out the mandatory steps a judge must follow in every criminal case in which a sentence of imprisonment is imposed.

The process mandated by statute is illustrated in Brewer v. Commonwealth, 550 S.W.2d 474 (Ky. 1977). In that case, the defendant argued that under K.R.S. 533.010 the trial court is required to consider the question of probation or conditional discharge and to make a record of such consideration and the reason for selecting an alternative. The Kentucky Supreme Court recognized that K.R.S. 533.010 (2)(a) - (c) prescribe guidelines to be used by the trial court in making the determination" and held:

> Even though the trial court has discretionary authority. . .regarding the granting of conditional discharge, it

> was required to consider the feasibility of this procedure. In view of this rule, the record of the proceedings leading up to the entry of the judgment should clearly reflect the fact that the consideration required by K.R.S. 533.010 had been afforded the convicted person before judgment was finally entered. Id. at 478.

The situation in Brewer is similar to the situation at bar. The record in Brewer failed to disclose any consideration of the feasibility of probation or conditional discharge. In the case at bar, the record clearly reflects a failure to comply with the statute:

> Mr. Sanders: We would again ask the court to consider probation or conditional discharge . . .
>
> Prosecutor: . . .after a jury verdict is returned it is our policy never to recommend a change from that jury determination . . .
>
> Judge Hehl: When the jury renders a verdict and sets a sentence and penalty, we don't touch it and we'll state here that probation was considered and it's the court's policy not to consider probation in instances such as this. . . (Trial Tape 7233, side 1).

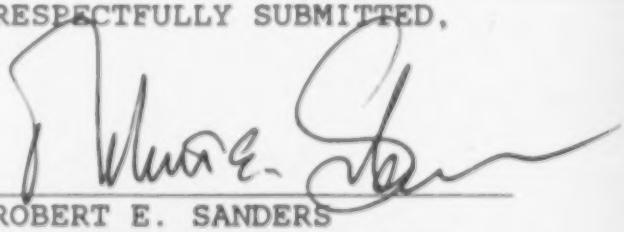
According to Brewer, the feasibility of granting probation must be evaluated pursuant to the factors enumerated in the statute, and the record must reflect such an analysis. The

mere fact that within the same sentence Judge Hehl stated "probation was considered" and that "when a jury renders a verdict and sets a sentence and penalty, we don't touch it", clearly illustrates that such a consideration, although paid lip service, was by no means considered pursuant to the mandates of K.R.S. 533.010 and Brewer. This is evidenced by the fact that Petitioner had no prior criminal history, owned her own home, and supported a child, and yet was not deemed a candidate for either probation or conditional discharge of this, her first offense. Equally evident is that such a failure on the part of the trial court constituted a violation of Petitioner's right tc due process of law under the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the reasons set forth above, Petitioner, Jo Evelyn Robinson, respectfully prays that a Writ of Certiorari be granted to review the Judgment of the Kentucky Court of Appeals.

RESPECTFULLY SUBMITTED,



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APPENDIX A

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 86-CA-1274-D

JO EVELYN ROBINSON — MOVANT

v. ON MOTION FOR DISCRETIONARY REVIEW
FROM CAMPBELL CIRCUIT COURT

COMMONWEALTH OF KENTUCKY — RESPONDENT

****

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: LESTER, McDONALD, AND REYNOLDS, JUDGES.

It is ORDERED that movant's motion for leave to file a reply to respondent's response is GRANTED, and the reply is ORDERED filed.

This Court, having considered the motion for discretionary review, the response thereto and reply to the response, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, DENIED.

ENTERED: July 23, 1986

/S/Charles B. Lester

JUDGE, COURT OF APPEALS

APPENDIX B

CAMPBELL CIRCUIT COURT

DIVISION NO. ONE

JO EVELYN ROBINSON,	)	
Defendant/Appellee,	)	
	)	
-vs-	)	NO. 85-X-039
	)	
COMMONWEALTH OF KENTUCKY	)	JUDGMENT
Plaintiff/Appellant.	)	

On November 4, 1985, an Order and Judgment was entered affirming the judgment of the District Court. On November 21, 1985, an Order was entered vacating this Judgment because the Judge of the Circuit Court had inadvertently entered said Order prior to the appellant having filed a reply brief. Subsequently a motion to recuse the Circuit Judge from participating was filed and said motion was sustained. Thereafter, this matter was, by Order of the Chief Regional Judge, referred to the undersigned.

This Court has reviewed extensively the record in this case, including the reply brief of the appellant. After such review, and having considered all of the arguments of counsel, and the Court being advised:

IT IS ORDERED AND ADJUDGED that the Judgment heretofore entered on November 4, 1985, which Order and Judgment affirmed the action of the Campbell District Court, is hereby adopted and reaffirmed. The judgment of the lower Court is affirmed.

Entered April 22, 1986

/s/George Muehlenkamp

JUDGE

APPENDIX C

CAMPBELL DISTRICT COURT

DIVISION NUMBER TWO

COMMONWEALTH OF KENTUCKY	:	
Plaintiff	:	
	:	
vs.	:	TRIAL AND VERDICT
	:	
JO EVELYN ROBINSON	:	
Defendant	:	
	:	

This cause coming on for trial on the 6th day of July, 1985, parties announced ready for trial; came this Jury:

Dorothy Huff, Elva Lonneman, Patricia McMillan, Holly Hegg, Stanley Hanson, Joe Kries,

who were duly impaneled and sworn to law to try the issue herein.

Having heard the evidence and argument by counsel for both the Commonwealth and the defendant, and being instructed by the Court, the Jury retired to its room for deliberation,

and after due diligence, returned the following verdict:

"We, the Jury, find the defendant guilty of prostitution and we fix her punishment at confinement in the County jail for a period of 30 days and a fine in the sum of $250.00.

/s/ Stanley Hanson, Foreman.

/s/ Lambert Hehl

LAMBERT HEHL, JUDGE

cc: Hon. Justin Verst

Hon. Robert Sanders

APPENDIX D

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend, XIV Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.